International Union of Operating Engineers Local 150, AFL–CIO *and* Diamond Coring Company, Inc. and Laborers' International Union of North America, State of Indiana District Council and its Local 81, AFL–CIO. Case 13–CD–582–1

August 25, 2000

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

The charge in this Section 10(k) proceeding was filed April 28, 2000, by Diamond Coring Company, Inc. (the Employer). The charge alleges that International Union of Operating Engineers Local 150, AFL–CIO (Operating Engineers Local 150) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Laborers' International Union of North America, State of Indiana District Council and its Local 81, AFL–CIO (Laborers' Local 81). The hearing was held May 18, 2000, before Hearing Officer Jason K. Bowler. The Employer, Operating Engineers Local 150, and Laborers' Local 81 have filed posthearing briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, an Illinois company, is engaged in the business of concrete cutting and sawing. During the past calendar year, it purchased and received at Illinois locations goods and materials valued in excess of $50,000 directly from points outside the State of Illinois.

The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Operating Engineers Local 150 and Laborers' Local 81 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

In November 1999 the Employer obtained a contract to perform saw cutting and sealing on a project in Merrillville, Indiana. At that time, the Employer and Laborers' Local 81 were parties to a collective-bargaining agreement in Indiana that covered employees classified as concrete saw operators, power saw operators, and concrete saw joint control cutting. In January 2000[1] the Employer assigned the Merrillville saw cutting and sealing work to its employees represented by Laborers' Local 81.

The work commenced in February. In April Operating Engineers Local 150 business representatives questioned the Employer's president, Anthony Cappello, about the assignment of the saw cutting work. Cappello replied that he had already assigned the work to employees represented by Laborers' Local 81. Operating Engineers Local 150 requested a meeting with Cappello.

On April 17 Cappello met with Operating Engineers Local 150 representatives. During the meeting, the representatives insisted that the work be assigned to operating engineers. When Cappello refused, the Operating Engineers Local 150 representatives replied, according to Cappello, "[I]f I didn't do it that there would be some kind of work stoppage or some kind of slow down." Cappello said they could not do that over a jurisdictional dispute, to which the representatives responded, "[T]here's a lot of ways to do different things."

On April 27 Operating Engineers Local 150 picketed the jobsite with signs reading "on strike against Diamond Coring for recognition as Majority Bargaining Representative of company's Operating Engineer employees." To resolve the picketing, the project's general contractor agreed to pay an operating engineer to watch the Employer's employees perform the disputed work.

B. Work in Dispute

The disputed work consists of saw cutting of concrete work performed by the laborer employees of the Employer at the Walsh Construction jobsite located at approximately I-65 and 61st Avenue, Merrillville, Indiana.

C. Contentions of the Parties

The Employer and Laborers' Local 81 contend that there is reasonable cause to believe that Operating Engineers Local 150 violated Section 8(b)(4)(D) of the Act. They further contend that the work in dispute should be assigned to the Employer's present employees represented by Laborers' Local 81.

Operating Engineers Local 150 asserts that the notice of hearing should be quashed because the picketing in which it engaged was recognitional only or because the parties have agreed on a method for adjusting the dispute. Additionally, Operating Engineers Local 150 argues that, should it be determined there is a jurisdictional dispute, the Board should award the disputed work to employees represented by Operating Engineers Local 150.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

[1] All dates hereafter refer to 2000, unless otherwise specified.

As to reasonable cause, Cappello testified that Operating Engineers Local 150 representatives threatened "some kind of work stoppage or some kind of slow down" when he refused to change the assignment of the work in dispute. A threat to cause a work stoppage to force reassignment of disputed work provides reasonable cause to believe that Operating Engineers Local 150 has violated Section 8(b)(4)(D) of the Act.[2] In view of the fact that there is reasonable cause to believe that such a threat was made, it is unnecessary to pass on whether the subsequent picketing by Operating Engineers Local 150 had as one of its objects the reassignment of the disputed work to employees it represents. See *Painters Local 1975 (L & H Paint Products),* 241 NLRB 420, 422 fn. 9 (1979).

As to the second issue, it is well established that to constitute an "agreed upon method for the voluntary adjustment of the dispute" within the meaning of Section 10(k) the private adjustment mechanism must be one to which all parties to the dispute are bound. *NLRB v. Plasterers Local 79*, 404 U.S. 116, 137 (1971). Operating Engineers Local 150 asserts that all three parties have agreed to be bound by a voluntary method for adjusting the dispute.

We find, however, that the parties' contracts do not mandate the same method of resolution. The contract between the Employer and Laborers' Local 81 provides that jurisdictional disputes will be resolved by the international unions of all unions having agreements with the Employer. Although Operating Engineers Local 150 has an agreement with the Employer covering work performed in Illinois, that contract contains a different dispute resolution mechanism. Therefore, we find that there exists no single method of voluntary adjustment binding on all the parties. See *Laborers Local 242 (Johnson Gunite)*, 310 NLRB 1335, 1337 (1993).

Accordingly, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there is no agreed-upon method for the voluntary adjustment of the dispute that is binding on all the parties within the meaning of Section 10(k) of the Act. Therefore, the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212* (*Columbia Broadcasting*), 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743* (*J. A. Jones Construction*), 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certifications and collective-bargaining agreements

Neither Union is the certified bargaining representative of a unit of the Employer's employees. The Employer has a collective-bargaining agreement with Laborers' Local 81 that encompasses saw cutting employee classifications. The Employer has no collective-bargaining agreement with Operating Engineers Local 150 covering the disputed work. Accordingly, we find the factor of collective-bargaining agreements favors an award of the work in dispute to employees represented by Laborers' Local 81.

2. Employer preference and past practice

The Employer prefers to assign the work in dispute to employees represented by Laborers' Local 81 consistent with its longstanding practice of assigning such work to those employees. Accordingly, we find that the factors of employer preference and past practice favor an award of the disputed work to employees represented by Laborers' Local 81.

3. Area and industry practice

The record contains conflicting evidence about the practice of other employers in the area and in the industry. Therefore, this factor does not favor an award of the work in dispute to employees represented by either Union.

4. Relative skills

The record contains evidence that employees represented by both Unions possess the ability to perform the work in dispute. Therefore, this factor does not favor an award of the work in dispute to employees represented by either Union.

5. Economy and efficiency of operations

The evidence establishes that assignment of the work in dispute to the Employer's own employees represented by Laborers' Local 81 is more efficient than assigning the work to employees represented by Operating Engineers Local 150 would be. Cappello testified that, under the agreement with Laborers' Local 81, the Employer could utilize laborers to perform other tasks when there was no saw cutting work to perform. Accordingly, the factor of economy and efficiency favors an award of the disputed work to employees represented by Laborers' Local 81.

Conclusions

After considering all the relevant factors, we conclude that the employees represented by Laborers' Local 81 are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining

[2] Operating Engineers Local 150 denied making such a threat. The Board has held, however, that "in 10(k) proceedings, a conflict in testimony does not prevent the Board from finding 'reasonable cause' and proceeding with a determination of the dispute." *Iron Workers Local 401 (William Watts, Inc.*), 317 NLRB 671, 673 fn. 2 (1995).

agreements, employer preference and past practice, and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by Laborers' Local 81, not to that Union or its members.

Scope of the Award

The Employer and Laborers' Local 81 request that we issue a broad order applicable to all similar work performed by the Employer in Indiana. Normally, 10(k) awards are limited to the jobsite where the unlawful 8(b)(4)(D) conduct occurred or was threatened. There are two prerequisites for a broad award: (1) there must be evidence that the work in dispute has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur; and (2) there must be evidence demonstrating the offending union's proclivity to engage in further unlawful conduct in order to obtain work similar to that in dispute. See *Electrical Workers Local 363 (U.S. Information Systems*), 326 NLRB 1382 (1998).

The record contains some evidence that Operating Engineers Local 150 may have claimed similar work on other projects and may have made threats concerning similar projects. However, we are not persuaded that the requisite showing has been made on this record that similar disputes are likely to arise in the future or that Operating Engineers Local 150 has a proclivity to engage in unlawful conduct to obtain similar work. In this connection, we observe that, so far as the record shows, there are no prior Board determinations involving disputes between these unions.

We conclude that the issuance of a broad award is inappropriate in this proceeding. Accordingly, our determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Diamond Coring Company, Inc., represented by Laborers' International Union of North America, State of Indiana District Council and its Local 81, AFL–CIO, are entitled to perform the saw cutting of concrete work performed by the laborer employees of the Employer at the Walsh Construction jobsite located at approximately I-65 and 61st Avenue, Merrillville, Indiana.

2. International Union of Operating Engineers Local 150, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Diamond Coring Company, Inc. to assign the disputed work to employees represented by it.

3. Within 14 days from this date, International Union of Operating Engineers Local 150, AFL–CIO shall notify the Regional Director for Region 13 in writing whether it will refrain from forcing Diamond Coring Company, Inc., by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.